No. 20063

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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A. & E. Plastik Pak Co., Inc.,

*Appellant,*

*vs.*

William N. Bowie, Jr., Trustee,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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Meyer Berkowitz,
280 South Beverly Drive,
Suite 510,
Beverly Hills, Calif. 90212,
*Attorney for Appellant.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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## APPELLANT'S REPLY BRIEF.

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I.

## ARGUMENT.

### A. The Restraining Order Prevented Trial of Appellant's Municipal Court Case From Proceeding to Judgment.

Reference is made to the statement on page 2 of Appellee's Brief that a trial of the Municipal Court case has not been had. The Municipal Court case was set for trial on July 27, 1964 but the Referee's Restraining Order prevented the case from going to trial and the said Restraining Order is still in effect. The Referee's original Restraining Order was issued May 28, 1964.

### B. The Trustee's Title Is Subject to the Attachment Lien.

Reference is made to the contentions of Appellee's Brief on pages 6, 7 and 8 thereof that since title to the attached funds passes to the creditor only after Judg-

ment, the Trustee in Bankruptcy is vested with title thereto under Section 70(a)(5) of the Bankruptcy Act (11 U.S.C.A. §110). This is a *non sequitur.* Appellant does not claim *title* to the attached funds but only an *attachment lien* with respect thereto. The title which the Trustee receives under §70 is *subject to the attachment lien,* even though it is contingent upon success of the litigation, since the Trustee takes the property *subject to all valid claims, liens and equities.*

> *4 Collier on Bankruptcy,* §70.04, p. 954.1;
>
> *Zartman v. First National Bank of Waterloo,* 216 U.S. 134 (1910);
>
> *Anglo Bank v. Schenley Industries, Inc.,* 215 F. 2d 651 (9 Cir., 1954);
>
> *Hyman v. McLendon,* 140 F. 2d 76 (4 Cir., 1944).

Section 70(a)(5) vests the Trustee with title by operation of law to Bankrupt's property ". . . which prior to the filing of the Petition he could by any means have transferred . . ." The Bankrupt could not have transferred the attached monies prior to Bankruptcy free of the attachment lien under California Law and the Trustee take no better title to the funds.

> *6 Cal. Jur. 2d,* §131.

### C. Appellee Misconstrues Metcalf v. Barker.

Appellee refuses to accept the facts as set forth in the reported decision of *Metcalf v. Barker,* 187 U.S. 165 (1902), and as viewed by the U.S. Supreme Court in its opinion with respect thereto. The creditors suit therein creating a contingent, equitable lien was commenced December 17, 1895 and Judgment was not entered there-

on until January 31, 1899, within four months of the bankruptcy of May 12, 1899. For the U.S. Supreme Court's rejection of the contention that title passed to the Trustee free of the lien, because the equitable lien involved was admittedly "contingent", see the quotations from the U.S. Supreme Court opinion on pages 8 and 9 of Appellant's Opening Brief.

If the present eleven month old attachment is invalid, what is meant by the provisions of Section 67 of the Bankruptcy Act (11 U.S.C.A. §10) which specifically makes null and void all attachments obtained at any time *within four months* prior to the filing of the Petition in Bankruptcy? Appellee seeks to delete from the Statute the three italicized words.

*Metcalf v. Barker* has already answered this question in holding that when the contingent lien is obtained more than four months prior to the filing of the Petition, ". . . its validity is recognized . . ." The *Metcalf* decision further states that ". . . if this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial . . ."

### D. Appellee Does Not Explain Why Section 60 Should Not Apply.

On page 10 of Appellee's Brief, referring to Section 60 of the Bankruptcy Act (11 U.S.C.A. §96) Appellee does not in any way refute the Appellant's position that since Section 60 defines an attachment within four months of bankruptcy as a preference, attachments *over* four months prior to bankruptcy are *not* preferences under the Bankruptcy Act. Appellee, without citing authority, merely states that ". . . Section 60 of the Act cannot and should not be applied . . ."

### E. No Authority Is Cited for the Trustee's Position.

It is important to note that Appellee can cite *no case* where an attachment preceding bankruptcy by over four months was invalidated. Certainly it is not unreasonable to require Appellee to cite some authority for its new, novel, and unique position which is contrary to the case law and completely out of harmony with the Bankruptcy Act.

## II.

## CONCLUSION AND PRAYER.

The Appellee's position is not supported by either case law or statute and is completely contrary to express provisions of the Congressional enactments on the subject of Bankruptcy. It is clear from the Bankruptcy Act that attachments perfected over four months prior to bankruptcy are exempted from any claim by the Trustee in facts such as exist in the case at bar.

Wherefore, Appellant respectfully prays that the Order of the United States District Court affirming the Order of the Referee in Bankruptcy be reversed and that Appellant be awarded its costs together with such other relief as is appropriate under the circumstances.

Respectfully submitted,

MEYER BERKOWITZ,
*Attorney for Appellant.*

## Certificate.

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those Rules.

MEYER BERKOWITZ